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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

EX PARTE OR LATE FILED

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Room TWB-204
Washington, D.C. 20554

Dear Ms. Salas:

Re: *Ex Parte*, CC Docket No. 96-98, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996

Enron Broadband Services, Inc. ("Enron"),[1] a wholly owned subsidiary of Enron Corp, is a leading provider of high quality, broadband Internet content and applications. The company's business model combines the power of the Enron Intelligent Network ("EIN"), Enron's Broadband Operating System (BOS), bandwidth trading and intermediation services, and high-bandwidth applications, to fundamentally improve the experience and functionality of the Internet. BOS allows application developers to dynamically provision bandwidth on demand for the end-to-end quality of service necessary to deliver broadband content. The EIN consists of 18,000 fiber miles. In addition, Enron has deployed pooling points in 25 cities worldwide; eighteen of the pooling points reside in the U.S., six in Europe, and one in Asia.

Enron also has created a market for bandwidth that will allow network providers to scale to meet the demands that increasingly complex applications require. Readily available, high-quality bandwidth capacity is an essential ingredient to the new age of broadband content that is being made available over the Internet. Enron's pooling points provide an interconnection and switching platform for buyers and sellers of bandwidth. They enable the dynamic provisioning

[1] Enron Broadband Services was formerly known as Enron Communications, Inc., and became a wholly owned subsidiary of Enron Corp in January 2000. Enron Broadband Services, Inc., can be found on the web at www.enron.net.

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and monitoring of bandwidth at varying speeds, terms and qualities of service. Consumers and carriers of bandwidth gain an additional sales channel for excess bandwidth, as well as the ability to secure bandwidth at short notice for varying periods of time. In addition, access to the value-added services of the EIN creates business opportunities in the delivery of advanced applications, such as streaming, digital media and e-commerce. By leveraging its market-making and risk management expertise, Enron is in a position to deliver more flexible bandwidth solutions.

I. UNE ACCESS IS A STEPPING-STONE TO FACILITIES-BASED COMPETITION

The telecommunications industry is now witnessing the emergence of new equipment configurations and software, as new market entrants attempt to deploy the most current technologies and as the ILECs upgrade their legacy technologies. The ability for new entrants to deploy their networks cost-effectively is vital to ensuring a competitive telecommunications marketplace. These network enhancements have the potential to bring significant benefits to consumers. For example, consumer access to higher speed networks allows them to enjoy new bandwidth intensive services, such as video-on-demand or broadband video games. The current use restrictions on EELs, however, are fueling competitive harm and thwarting consumer access to these benefits. As a result of the *Supplemental Order* and *Supplemental Order Clarification*, the ILECs are able to restrict access to their network architecture and constrain new entrants' ability to offer competitive services by denying access to EELs.

The Telecommunications Act of 1996 ("the Act") was designed to apply to a dynamic market. Congress was aware that telecommunications technologies were changing, and the statute specifically intended to accelerate the deployment of advanced telecommunications and information technologies. Thus, the Act intended to encompass future, as well as present network technologies. Moreover, that is why the Act refrained from conditioning access to network elements on the type of telecommunications service that the requesting carrier would provide using the network element. *See* CompTel Comments at 18. In fact, the Act simply imposed upon ILECs "the duty to provide, to any requesting telecommunications carrier for the provision of **a telecommunications service**, nondiscriminatory access to network elements on an unbundled basis . . . in a manner that allows requesting carriers to combine such elements in order to provide **such telecommunication service**." *See* 47 U.S.C. sec. 251(c)(3) (emphasis added).

Congress surely never intended for the Act to fashion two separate competitive local markets, one for CLECs providing voice services; and the other, CLECs providing data services. This is inconsistent with the Act's inclusion of all types of services under the "telecommunications services" umbrella. Accordingly, the Commission must remove the "significant local usage" requirement pertaining to the availability of an EEL as a replacement for special access service in light of the unjustifiable distinction that this restriction draws between voice and data services. The Commission must continuously ensure that its regulatory

actions preserve the spirit of the Act and fulfill the fundamental goal to create a competitive local market where ILECs provide nondiscriminatory access to their UNEs to **all** CLECs irrespective of the services that CLECs provide using such UNEs.

Further, eliminating use restrictions for EELs would enable CLECs to avoid investing in facilities uneconomically, as collocation would not be required in every wire center. *UNE Remand Order*, at para. 288. The days of "build and they will come" are over. Capital markets no longer have patience for CLECs that build networks in the hope of subsequently obtaining a customer base that justifies the build. In fact, the recent exodus from the local market of a large number of CLECs unable to dedicate the large amount of capital necessary to compete on the "build and they will come" basis is proof of the urgency involved in eliminating the current use restrictions on EELs.

Unbundled network elements are a stepping-stone to facilities-based competition. These elements are building blocks to the time when a facilities-based competitor like Enron would consider building its network deeper into specific metropolitan areas. For a new entrant like Enron, that time is not now when a predicted customer base does not justify the build. With access to UNEs and UNE combinations, however, Enron could extend the reach of its network and attract a customer base that would facilitate competition in the local market and expand the reach of its broadband service offerings.

There has been no new development to alter the Commission's previous determination in the *UNE Remand Order* that "replicating an incumbent's vast and ubiquitous network would be prohibitively expensive and delay competitive entry." *Id.*, at para. 182; *see also* WorldCom Comments at 4. The Commission has properly directed considerable attention to the matter of EELs and should make haste at this juncture to remove the use restrictions.

II. PRO-COMPETITIVE PRINCIPLES AND POLICIES MUST BE PRESERVED TO ENCOURAGE INNOVATION

In the *UNE Remand Order*, the Commission refused to impose restrictions on the use of UNEs because it acknowledged that the Act does not permit use restrictions. *UNE Remand Order*, at para. 484. Specifically, the Commission found support for this conclusion in Rule 51.309(a) which states that "[a]n incumbent LEC shall not impose limitations, restrictions, or requirements on request for, or the use of, unbundled network elements . . . ." *Id.* (citing 47 C.F.R. section 51.309(a)). Use restrictions, even "interim" restrictions, therefore violate the plain and unambiguous language of the Act. *See* CompTel Comments at 17.

As a preliminary matter, pursuant to the Act, CLECs are entitled to obtain existing combinations of loop and transport between the end-user and the ILEC's serving wire center on an unrestricted basis at UNE prices. *See* 47 C.F.R. sec. 51.309(a), 51.315(b). Moreover, the Commission properly noted that:

> [T]o the extent those unbundled network elements are already combined as a special access circuit, the incumbent may not separate them under rule 51.315(b), which was reinstated by the Supreme Court. In such situations, **it would be impermissible for an incumbent LEC to require that a requesting carrier provide a certain amount of local service over such facilities.**

UNE Remand Order, at para. 486 (emphasis added). This type of use restriction severely impacts the competitive viability of new entrants and violates the pro-competitive principles and policies defined by the Act. Similarly, the use restrictions on EELs today violate the Act. *See* CompTel Comments at 17 ("Use restriction on UNEs are inconsistent with the plain language of the statute.").

Unbundled network elements, specifically loop and transport combinations, can carry many different types of traffic. When CLECs purchase UNEs from the incumbents, they are not purchasing a particular type of service. Instead, "the carriers are purchasing access to a functionality that can be used to provide a service when combined with other elements and/or functionalities." *Id.* at 19. As a result, when a CLEC purchases a UNE or a combination such as an EEL, it should have the discretion to use that UNE or EEL to provide any type of service the circuit(s) can support. Surely the Act meant for such discretion to be allowed.

Enron would like to see the Commission fulfill its objective of "advanc[ing] the development of facilities-based competition and . . . encourag[ing] innovation by both incumbent and competitive LECs." *UNE Remand Order*, at para. 110. Imposing restrictions on the use of EELs, however, precludes facilities-based competition and discourages the development of innovative products and services.[2] This result not only conflicts with the Commission's worthy objective, but remains at odds with a fundamental goal of the Act –"to promote innovation and investment by **all participants in the telecommunications marketplace**, and in particular, to encourage rapid deployment of new telecommunications technologies." *Id.* (Emphasis added).

For an unprecedented six years in a row, *Fortune* magazine has bestowed the title of "most innovative" on Enron Corp as it continues to invent creative solutions and service offerings that will benefit a variety of consumers.[3] In the telecommunications market, Enron is providing consumers with a host of innovative products and services, including, but not limited to, enhanced Internet access, Entertainment-On-Demand ("EOD"),[4] and data storage. Restricting

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2 Enron would like access to EELs in order to bring data applications and advanced services to consumers.

3 *See Fortune*, February 6, 2001.

4 Enron has created a secure end-to-end platform to deliver films, TV, and music on demand.

the availability of EELs confines the reach and limits the benefits of such dramatic innovation. *See* EPN Comments at 7 ("[T]he local usage restriction is misguided because it is rooted in the policies of a switched voice world and ignores the revolution sparked by digital communications.").

With a business plan primarily focused on providing data services on its packet-based network (*i.e.*, the EIN) as well as via access to UNEs, it is highly difficult for Enron to demonstrate compliance with any of the three safe harbors adopted by the Commission in its *Supplemental Order Clarification*. *See Supplemental Order Clarification*, at para. 22. Enron agrees with EPN that "any local usage restriction that the Commission imposes, whether through the current temporary restriction on conversion of special access circuits to EELs or a decision to exempt ILECs from unbundling UNEs for exchange access is untenable in the packet-based telecommunications networks carriers are currently deploying for the present and future." *Id.* at 15.

Like other CLECs that seek to provide innovative services but may not qualify for EEL access, Enron subsequently is forced to purchase the ILECs' above-cost special access services in order to reach its customers – except in very limited cases where CLEC facilities are available. This result clearly runs afoul of the Act's goal to promote innovation and participation by all in the telecommunications market. *See* WorldCom Comments at 29 (permitting CLECs to use EELs only if offering basic local telephone service is clearly at odds with the Act's goal of promoting innovation).

The pro-competitive principles and policies at the core of the Act must be preserved in a manner that affords competitors a meaningful opportunity to compete and consumers the ability to choose from an array of innovative service offerings. There is no rational public policy basis for imposing restrictions on the use of EELs. Enron wants to extend the reach of its broadband network and services to consumers across the country. To do so, it is imperative that UNEs and combinations of UNEs be available without use restrictions.

III. THE AVAILABILITY OF EELS IS CRITICAL TO NETWORK DEPLOYMENT IN AN ECONOMIC FASHION

In the *UNE Remand Order*, the Commission's decision-making process was sound and methodical, taking into account the need to encourage competitive entry and the hurdles facing new market entrants. In large part, these hurdles encompass avoiding uneconomic investment in facilities and replicating the incumbents' networks, in particular with regard to local loop and transport facilities. *UNE Remand Order*, at paras. 89; 182-184; 288; 321. In addition, the Commission acknowledged that lengthy rights-of-way disputes hinder the competitive goal to foster rapid market entry. *Id.* at par. 186. Enron has encountered such disputes involving municipalities or building landlords/owners. In view of these barriers to market entry, Enron

submits that the availability of EELs is essential to deploying and extending the reach of its network in the most cost-efficient manner possible.

Unrestricted access to EELs would allow CLECs to expand the reach of their networks economically. EELs are pro-competitive because they enable new market entrants to offer services by reducing cost-prohibitive and inefficient investments in transport facilities to a number of wire centers. In addition, unlike the collocation investment that the ILECs require when CLECs order transport and loop as separate UNEs, new market entrants avoid the need to invest in collocation facilities in every single wire center when EELs are an available option. *See* WorldCom Comments at 4. For carriers like Enron whose business plan may not qualify the company for EEL access under the current restrictions, the requisite investment to compete broadly in local markets is daunting and a deterrent to market entry.

Like AT&T and EPN, Enron submits that in many cases it is cost-prohibitive to build the necessary loop and transport facilities, especially when the ILECs already have such facilities in place. *See* AT&T Comments (Declaration of Anthony Fea and William J. Taggart III) at 30-31; EPN Comments at 10. The predicted traffic volume must justify the build. As the Commission acknowledged in the *UNE Remand Order*, "a carrier must acquire a sufficient customer base if it is to recover substantial costs associated with deploying its own facilities." *UNE Remand Order*, at para. 80. Clearly, the time it would take to construct the necessary facilities would substantially and unnecessarily delay competitive entry, not to mention a potential loss of confidence in the CLEC's capabilities by its customers.

In the case of loops and dedicated transport, Enron's own experience in building its network and seeking to expand current network coverage conforms with the conclusion that numerous CLECs have voiced in this proceeding, as well as the Commission's analysis in the *UNE Remand Order*, that CLECs are impaired without access to these network elements. *UNE Remand Order* at paras. 165, 321. While Enron has some fiber within metropolitan areas that is connected to its individual pooling points, it has encountered great difficulty in obtaining local loop and dedicated transport necessary to extend the reach of its network within the metropolitan areas. To suggest that CLECs can easily turn to third party suppliers (*e.g.*, other CLECs) for loop or transport is simply wrong. The ILEC is still the only carrier with loop and transport facilities in the vast majority of cases -- even in large metropolitan areas. Enron is not alone in this discovery. *See, e.g.*, AT&T Comments (Declaration of Anthony Fea & William J. Taggart III at paras. 32-37); EPN Comments at 10; 12-13; Global Crossing Comments at 9.

To enable local competition, access to the EEL is critical. CompTel framed the issue well when it stated that: "The EEL restrictions force an entrant to choose between investing in unnecessary facilities in order to obtain a cost benefit compared to supra-competitive special access rates, or simply paying excessive special access rates to the ILECs and investing fewer resources in other aspects of its business model." *See* CompTel Comments at 15. It is cost-prohibitive to require a CLEC to collocate at significant cost in every wire center when EELs

would eliminate the need to do so. The Commission must act to remove the use restrictions so that this type of entry barrier is no longer in place. To encourage local competition, CLECs should not be prevented from using UNEs while developing economies of scale.

In the *UNE Remand Order*, the Commission correctly applied the impair standard by taking into account factors such as cost, timeliness, quality, ubiquity and operational issues. *See, e.g., UNE Remand Order*, at paras. 62-66. If the Commission were to re-apply the impair standard today, it would almost certainly find that minimal additional progress has occurred towards creating a competitive local market since its UNE Remand decision. For example, there still is no alternative to the ubiquity of the ILECs' networks. In addition, without access to UNEs, it is difficult to avoid overinvesting in facilities. Enron submits that, even with access to UNEs, overinvestment occurs when a CLEC is declined access to an EEL and thereby obligated to collocate in every wire center.

In light of Phase II pricing flexibility for BellSouth, SBC and Verizon, the need to remove the use restrictions on EELs in order to jump-start facilities-based competition to ILEC special access is now more acute than ever before. By using its pricing flexibility, one of these ILECs easily could implement a price squeeze to increase CLECs' costs for particular services. *See* WorldCom Comments at 25-26. As WorldCom acknowledged, "the ILEC special access services that CLECs would need to 'fill out' their networks are precisely those that will be subject to the least competition – and are therefore likely to see the largest rate increases." *Id.* The Commission must ensure that the ILECs refrain from cross-subsidizing their special access services subject to pricing flexibility where competition may exist with revenues from special access services where less competition exists to disadvantage their competitors. *See* CompTel Comments at 10. The focus clearly must shift from protecting ILECs' revenue streams to encouraging local competition in accordance with the Act.

In order to further encourage CLECs' network deployment in an economic fashion, the Commission also must affirmatively dismiss ILEC contentions that UNEs cannot traverse the same transmission path as special access circuits. Enron agrees with ALTS that: "The only conceivable purpose for ILECs to prohibit CLEC EELs from riding the same transmission path as special access circuits is to increase costs to CLECs and make it more difficult for CLECs to compete on an equal footing with ILECs." *See* ALTS Comments, at 2. Although the prices may differ and the nomenclature is not the same, it is difficult to understand why ILECs persist in their quest to prohibit co-mingling unless they simply wish to block competition. It is up to the Commission, however, to ensure that competition does in fact evolve.

Two copies of this Ex Parte Letter are being submitted to the Secretary of the FCC in accordance with Section 1.1206 of the Commission's rules.

Sincerely,

Aileen A. Pisciotta
Counsel to Enron Broadband Services Inc.